Supreme Court of the United States

OCTOBER TERM 1970

In the Matter of:

STATE OF OREGON, Plaintiff, vs. JOHN N. MITCHEEL, ATTORNEY GENERAL OF THE UNITED STATES. Defendant.	Docket No. 43 ORIG
STATE OF TEXAS, Plaintiff, vs. JOHN N. MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES. Defendant.	Docket No. 44 ORIG

Place Washington, D. C.

Date October 19, 1970

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300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1970

STATE OF OREGON

Plaintiff,

vs

No. 43

JOHN N. MITCHELL, ATTORNEY GENERAL OF THE U. S.

Defendant.

STATE OF TEXAS

Plaintiff,

vs

No. 44

JOHN N. MITCHELL, ATTORNEY GENERAL OF THE U. S.

Defendant

Washington, D. C.
Monday, October 19, 1970

The above-entitled matter came on for argument at 10:10 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

LEE JOHNSON
Attorney General of Oregon

CHARLES ALAN WRIGHT
Austin, Texas

ERWIN N. GRISWOLD
Solicitor General of the United States
Department of Justice
Washington, D. C.

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: The Court will hear arguments in the first case on today's calendar, Number 43, original. Oregon against Mitchell.

Mr. Johnson you may proceed whenever you are ready.

ORAL ARGUMENT BY LEE JOHNSON ON BEHALF OF THE STATE OF OREGON

MR. JOHNSON: May it please the Court: this is an original action under Article III, Section 2 of the Constitution and 28 U.S.C. Section 1251 in which the State of Oregon is the plaintiff and the defendant is the Attorney General of the United States, John Mitchell, which is not a resident of the State of Oregon.

We are seeking a decree that Title III of the Voting Rights Act of 1970 is unconstitutional in enjoining the defendant from enforcing this title with respect to the plaintiff state.

The guts of that statute is simply in Section 302 which prohibits states from denying the franchise to any person over the age of 18 who is otherwise qualified to vote.

Q Residence, is that involved --

A We are not challenging them, Mr. Justice.

The Oregon Constitution, like that of 36 other states, restricts the franchise to those who are 21 years and older. And I might add that in May of 1970 the voters of Oregon

overwhelmingly defeated a constitutional amendment which would have reduced the voting age to 19.

There are some points in the plaintiff's argument over which I think there is little dispute and which I would like to dispose of at the outset.

First, the states have traditionally determined voter qualifications and that tradition was contemplated by the drafters of the constitution in Article I, Section 2 dealing with the election of representatives and Article II, Section 1 dealing with the selection of presidential electors and was reaffirmed even after the passage of the 14th Amendment, was reaffirmed in the 17th Amendment which deals with the election of Senators.

Secondly, states certainly have a vital and legitimate interest in restricting the franchise to responsible persons and age is certainly a relevant criterion in determining the qualifications for voter responsibility.

Thirdly, the implementation of an age classification inevitably leads to line-drawing and reasonable men can certainly differe as to the precise location of that line.

I think also there are obviously outer limits over which reasonable men would also not differ that the line was not reasonable.

Fourthly, while legislative wisdom may prefer one line over another, no one can seriously argue that a minimum

of 18 or 19 or 20 or 21 is irrational, irrelevant or invidious. I think this Court could perceive a reasonable basis for any one of these choices.

I think the point was put very succinctly by Professor Herbert Weschler in a letter to the President which appears in the Congressional Record on this legislation, in which he states, and I quote:

"Age is obviously not irrelevant to qualifications and since any age criterion involves the drawing of an arbitrary line, fixing the age at 21 most certainly is not capricious."

I think that there will be considerable dispute over many issues that will follow in my argument and that the Solicitor General will raise, but I think really the issue in this case boils down to one point, and it is simply this: it is whether Congress has the power to substitute its legislative preference in selecting that line for the preference of the voters of the State of Oregon.

Of course for Congress to exercise such a legislative mandate it must look to one of the enumerated powers efendant concedes that the responsibility for determining voter qualifications is at least primarily vested in the states by the Constitution.

The defendant rests its case on Section 5 of the 14th Amendment.

I think in order to understand Section 5 we must first examine Section 1 of that amendment and I think the point should be made that Section 1, standing alone, is not an affirmative grant of power to Congress, but rather is merely a prohibition against the states. And this is in contrast to the enumerated powers of Congress, such as interstate commerce that are enumerated in Article I, Section 4 of the constitution.

Section 5 in the 14th Amendment gives Congress the power to do all that is necessary and proper to enforce the prohibition of Section 1, but the test necessarily must be whether the power exercised by Congress is appropriate to the enforcement or whether it is prohibited by Section 1.

In Title 3 Congress and the defendant have attempted to obviate this test by bootstrap reasoning. First, in Section 201 of the Act, Congress declares that requiring a citizen to be 21 years of age in order to vote is a violation of the equal protection prohibition and therefore it is necessary and proper to enforce the prohibition by preventing the states from denying the franchise to anyone who is over 18.

Secondly, defendant now asserts the judicial of Congress's findings is confined to the single issue of whether the court can perceive any rational basis therefor.

We concede that the perceived basis test is the appropriate test of legislation under the necessary and proper clause embodied in Section 5.

We also concede that it's a proper role for Congress toseek and identify violations of equal protection prohibition, but there is still one defective link in defendant's chain of reasoning that destroys the connection.

We submit that first that the perceived basis test is not the appropriate test of judicial review in determining the scope and the meaning of the equal protection prohibition. This is a determination that must be made by this Court, exercising its independent judgment and review.

Secondly, even if the perceived basis test is applicable there is no ground in this case for perceiving a basis that Title III is aimed at a 14th Amendment objective.

Now, the defendant relies on a single case: Katzenbach versus Morgan. I am sure the Court is familiar with this case but to briefly reiterate the facts, the Congress by enactment that prohibited the states from denying the vote on account of illiteracy to any person of Puerto Rican ancestry who had attended six years in an American school.

The difficult problem in the case was that literacy tests on their face certainly are not invidious or irrational. Nevertheless, the Court, and we believe correctly, upheld the act because it, and I quote: "may be readily seen as plainly adapted to further the aims of equal protection."

The Court in its majority opinion followed two rationales in reaching this conclusion: first, that the enhanced

political power would or may be helpful in gaining an undiscriminatory governmental services for Puerto Ricans. And for that reason the Court could perceive a basis that the legislation was necessary and proper to insure equal protection of the laws for this particular ethnic minority group.

Secondly, the Court could perceive a basis for Congress ascertaining that the New York literacy test was being used as a direct device to deny the franchise to Puerto Ricans solely because of their national origin.

Under both rationales the Court, and again we believe rightly, confined Congress's powers to determine what is necessary and proper in the broadest terms and confined its review to whether it perceived a basis for Congressional determination.

But, contrary to the defendant's argument, the Court merely confirmed what was obvious in that case, that the object of the legislation was plainly adopted for furthering the aims of the 14th Amendment.

As the Court itself recognized, the sole practical effect of that act in Katzenbach versus Morgan was to extend the franchise to large segments of a minority group which had heretofore been denied the right largely as a result of their national origin. And of course, the action denying rights to minorities because of their race, color, national origin are classic 14th Amendment objectives.

But, contrary to defendant's argument, there is no suggestion in Katzenbach versus Morgan that the Court was saying that Congress had not only broad powers to fashion remedies, but that Congress could, indeed, determine what is prohibited by Section 1.

In other words, what is prohibited by the equal protection clause and that that determination by Congress would be binding upon this Court.

Defendant's interpretation can only be supported by taking isolated sentences from the opinion and reading those sentences totally out of context. Furthermore, there is no support in the precedents for defendant's interpretation.

Defendant cites cases involving interstate commerce, but the issue in those cases was not what is interstate commerce but rather what is Congress's power under the necessary and proper clause. Inall of those cases the Court still rev reserved to itself the ultimate determination of the issue of what is interstate commerce.

I'd like to suggest that if you follow defendant's rationale would mean that there would be hardly an area of state legislation, of state law that Congress could not preempt, because as this Court has many times recognized, legislatures must make choices and necessarily must make classifications or if you like, we can call them "discriminations." But these classifications are inherent in the legislative process.

Section 1 of the 14th Amendment does not prohibit all classifications and it never has; but only those which are irrelevant, invidious or irrational. But, if we are going to leave to Congress the prerogative to determine which classifications come with equal protection, then Congress could declare almost all state legislation -- declare the classifications therein as a violation of equal protection and thus deem within their scope so that they could preempt states and render the state legislatures virtually unnecessary.

But as a practical matter, the attraction of state power or state jurisdiction in the defendant's rationale may not be as significant as the effect that that rationale would have upon the jurisdiction of this Court. In the first place if we follow defendant's rationale and if Congress can determine what is violative of the 14th Amendment, then by equal logic Congress should be able to determine what is not violative of the amendment.

I think the Court in its opinion in Katzenbach versus Morgan clearly indicates that it was not buying the defendant's argument because in footnote 10 the Court indicates that now it is reserving to itself the -- to its independent judgment what is violative and what is not violative of the 14th Amendment.

Q It was very predominating in one way, one direction.

A My only response to that, Mr. Justice, would be that I can't see how you can reserve it one way and not go both ways, and I think that is --

Q That's what footnote 10 said; wasn't it?

A The question is: whether, I think really the question is whether the majority opinion goes as far as the government says it does and I think one of the indications that it does not is that footnote.

Q Well, I'm not defending the footnote because I was on the other side of it,but after all, there it is.

Q May I ask you one question?

A Yes.

Q Would your position be different if all the Federal Acts provided was that voters voting for state offices, like Governors and so forth, or if it provided that it affected only voters voting for President or Members of Congress?

A I think that the legislation would be on a stronger basis if it was limited to only Federal offices because then possibly the government could rely on its general preservation of the Federal election process as the grounds, and not the 14th Amendment, to uphold the statute.

So, for that reason I would say it would be a different ballgame. But, in this case they have rested it solely

upon the 14th Amendment.

Q You mean to apply to all voters for state and Federal offices?

A Are the provisions severable?

A I think it is possible to make them severable, although the act does not contain a severability clause and I think if we do make them severable the Court should maybe consider the very definite administrative difficulty that this would probably create and maybe it would be better to refer it back to Congress because if the states are put in the position that they have to grant the franchise to 18-year-olds in Federal elections but not in state elections this creates a tremendous administrative burden.

So, it seems to me there would be a real question as to whether Congress actually intended that the statute be severable.

The second point I would like to make is that if Congress is to be the interpreter of the 14th Amendment then it likewise would have to be the interpreter of other sections of the constitution. For example: Congress could not only determine what was necessary and proper, but it could determine what, in fact, is interstate commerce. Congress could reserve for itself to determine what, in fact, is a constitutional tax.

I point you to Article I, Section 8 of the constitution, which says: "Congress shall have the power to

make all the laws which shall be necessary and proper and all other powers vested by this constitution in the government of the United States or in any department or officer thereof."

Under defendant's rationale Congress could determine itself the limits of the power conferred upon itself, the limits of the power conferred upon the President, the limits of the power conferred upon this Court and the limits of the powers of the Federal Government as against the States, subject only to the test of whether this Court could perceive a basis. It seems to me if we follow the defendant's rationale we are doing nothing less than repudiating the doctrine of judicial review.

We submit that Katzenbach versus Morgan does not go that far; it merely holds that Congress had broad powers to fashion remedies to enforce the prohibitions of the 14th Amendment.

In the instant case there is no equal protection objective that can be identified. Unlike Katzenbach versus Morgan which enfranchised a minority ethnic group, the sole effect, the sole practical effect of Title III would be to enfranchise any person who is between the ages of 18 and 21. Now, there is no suggestion in the Congressional debate and indeed, there could be none that this will enfrancise a group which had heretofore been discriminated against because of their race, their color, their national origin or economic status, or on

any other basis that could be classified as invidious, irrelevant or irrational.

Now, to some, including myself personally, it would be desirable to extend the franchise, but legislative desirability is not the test. The issue which this Court must decide and cannot cede to Congress to decide is whether restricting the franchise to those who are 21 is so inherently unreasonable as to be irrational or irrelevant.

We submit that 21 years of age -- the 21-years-of age standard employed by Oregon and 36 other states, indeed, which is infirm in Section 2 of the 14th Amendment, which deals with reapportionment, the only place in the United States Constitution where the 21-year-old standard is mentioned. But this is certainly an affirmance of what has gone on for many years; that the 21-year-age standard is a reasonable classification even if it might not be a desirable classification, it is a reasonable classification that falls much far short of the prohibitions of the 14th Amendment.

We feel that the government advances the argument that there must be a compelling state interest and advances many arguments which are legislative reasons, not constitutional reasons, but legislative reasons for extending the franchise to 18-year-olds. And the suggestion is made by the government that great deference should be given to Congress because they are better at this line-drawing exercise than the Court is. Well,

we suggest that once you accept the proposition that a line has to be drawn and that there is an area in here in which reasonable men can differ as to where that line should be drawn, that the decision there is not to be made by Congress because the constitution contemplates that that decision as to voter qualifications is to be made by the states.

And still the only question is whether the classification that is made by the states meets the 14th Amendment standards of being invidious, irrational or irrelevant.

For these reasons we pray that the Court will grant the relief the plaintiff prays for.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Johnson.

Mr. Wright, you may proceed whenever you are ready.

ORAL ARGUMENT BY PROFESSOR CHARLES ALAN WRIGHT

ON BEHALF OF THE STATE OF TEXAS

MR. WRIGHT: Mr. Chief Justice and may it please the Court: although the position of Texas is exactly the same as that of Oregon, I want to take, insofar as possible, to avoid duplicating the able arguments which Attorney General Johnson has made on behalf of Oregon with regard to Title III.

Last week, reading one of the amicus briefs, to one of the most respected law firms in the United States, has lent its name, I came across an argument in support of this statute that seemed to me quite interesting. It was said that even here it was not a denial of equal protection to deny the vote to

those between 18 and 21, that many in that age group think that it is, that this causes a sense of alienation and the Congress has power under Section 5 of the 14th Amendment to cure this feeling of alienation even if it is the product of only an apparent and not a real denial of equal protection.

That argument, it seems to me, to highlight the unreality of this entire litigation. Were it not for the respect that is always due to the body that sits across the street I suggest that the proper response of this Court would have been to dismiss out of hand the attempts to support this legislation, on the grounds that the legislation is frivolous.

Prior to 1965 I cannot suppose that anyone could imagine that the Congress of the United States has the power to substitute its preference for that of the states with regard to the age of voters. Even under the broadest reading of Katzenbach v. Morgan it is still necessary inthe phrase of John Marshall picked up there that the "Acts of Congress be consistent with the letter and spirit of the constitution," and I submit that this legislation is not; that this legislation flies in the face of the letter of the constitution; that it does violence to a constitutional tradition that has gone on as long as the country has existed.

There are many provisions in the Constitution of the United States that are not hastily read and about which reasonable men can readily differ but I should have thought that

the numerical provisions in the constitution, above all, are provisions that have one meaning, a meaning that does not change with the passage of time, but when the people of the United States and the 14th Amendment refer twice to 21 years of age as being an appropriate age for people to vote, that they meant 21 years of age; that they did not mean at 18 or some other number, no matter how functionally similar that number today may be to what 21 was a century ago.

It is, I suppose, always a temptation of counsel to overstate the importance of this case and I do not wish to sound like George Wharton Pepper arguing Carter v. Carter Cole or like the distinguished advocate who argued the first income tax case, but I submit, as seriously as I can, that these issues in this case have nothing to do with whether 18-year-olds vote or not; that's an ideal that plainly is going to come, whatever the decision of this Court in this case; the issue in this case is more fundamental from that. It is whether the historic concept of this country, a country of Federal union in which the central government and the states share powers and responsibilities allocated by written constitution, whether that concept is a failure; whether we now must take constitutional shortcuts in order to impose on the states a reform that to a majority of Congress seems desirable but that 46 states have not yet seen fit to embrace.

The most rigorous test for state voting

the Equal Protection Clause is that the states must be able to show a compelling state interest to justify the exclusion of the group from the electorate. Even measured against that test it seems in my submission, that Texas and 35 other states come through with flying colors.

The distinguished Solicitor General agrees, as I understand his brief, that there is a compelling state interest is seeing to it that the electorate is composed of persons who are well-informed, mature, responsible. The question then becomes how you go about implementing this compelling state interest, how you identify those persons who would qualify to exercise the privilege of sufferage from those who are not. And here again, I believe, if I understand him correctly, that the Solicitor General does not disagree with our position, that age is an appropriate means for making this determination. No one supposes that age is an infallible, perhaps not even a very good, criterion for this purpose.

There is in the courtroom today a 17-year-old citizen of my state who is better-informed, more responsible, more mature than most 18, 21, 43-year olds that I know, but neither Congress nor the State of Texas are going to allow him to vote because neither one of us have any calipers by which we can say, "Yes, this 17-year-old is ready to vote; this 17-year-old is not." And so the invariable practice of the American States, a practice that Congress does not undertake to supercede

in this legislation, is that we are going to elect an age and we are going to indulge a presumption that when a person reaches a certain age at that point he possesses in sufficient quantity these qualities of education, responsibility, maturity, that will let him become a part of the political process.

Perhaps as a matter of preference, desirability or the impressive data that was spoken of on the floor of Congress suggests that today we can safely entrust to those who are 18 this privilege and responsibility, but Texas and 45 other states have said no. We have said that we would rather wait until the person is 21, because when he reaches that age we can be reasonably confident that he has the needed qualities.

For Congress tosay that we are denying to our citizens the equal protection of the laws by doing this, for Congress to say that somehow this determination on the partof Texas is irrational or invidious or unnecessary for state purposes is simply to substitute Congress's determination of this factual question for the determination that the people of Texas have made for themselves, a determination that we think we were amply justified in making for ourselves in light of the specific twice-repeated language of Section 2 of the 14th Amendment.

Q Professor Wright I think, though, you do would be making the same argument if Section 2 were not in the 14th Amendment?

A I would be making the with much

less confidence that it would prevail, Mr. Justice.

Q Well, let's assume it isn't there and say that a state had put their voting age at 45 and that Congress had had come along and said, "All people are 21 may vote," you would still make the same argument.

A I hope I would not.

Q Well, Congress would still be substituting its judgment for --

A Yes; it seems to me, sir, if I may, that at this time isn't exactly as you suggest when the difference is not merely one of preference but a difference so extreme in kind that the state action may possibly be regarded as caprisious and not identifying with the compelling state interest we think is --

Q You would simply say that the Courts could find that to be denying equal protection or the Congress could simply inform the Courts of its opinion.

A I think that the Court would find that that would deny equal protection even uninformed by Congress.

Q But do you think that even after Section 2 that this legislation Congress has passed is beyond its power?

A Even absent Section 2; yes, sir.

Q Even though quite an argument can be made that 18-year-olds are as capable as 21-year-olds today?

A Yes, sir. If I may expand on that answer

a moment, Mr. Justice, it seems to me the opposite of the argument you suggest that it is important it is not that you can argue that 18-year-olds aren't as capable as 21, but that on the other hand, one can argue that to require that voters be 21 is not such a difference from 18 as to be an irrational judgment.

Q Yes, but where does that leave Section 5 then of the 14th Amendment? If reasonable men can differ about the difference between 18 and 21 then Congress comes along and says "18." You would say that's inappropriate legislation?

A Yes, sir.

Q Professor Wright, what do you think of the government's suggestion that the history shows that there are references to age 21 in Section 2 for a particular purpose; that they were written in light of the effort to assure the franchise to the emancipated slaves who otherwise met the then existent voter qualifications?

A Mr. Justice, I think that everyone who has studied Section 2 of the 14th Amendment, knows that it was a Federally-contrived compromise which was intended not only to put a premium on the Negro voting in the South but not in the North, but it intended also to make sure that aliens in New York and women in Massachusetts were counted in apportionment of Congress, while they were denied the vote at the time, but I have not understood that there was any history indicating that

the choice of the age 21 in that provision was any part of this elaborate political compromise and as I read history the age 21 is there because, not only the draftsmen of the 14th Amendment, but the states that ratified it, regarded 21 as the proper age at which one became a part of the electorate.

The Solicitor General suggested that perhaps the references to 21 in Section 2 may be regarded as descriptive rather than prescriptive. It is a suggestion that we find difficult to follow. The section says, and this is not merely describing; it is prescribing -- that if you start denying the right to vote to persons who are over 21 years of age who otherwise meet the test we say here, you are going to lose that proportion of your Congressional delegation that the number your exclude bears to the whole number of persons over 21 and that, in my submission, is prescriptive language. That it has never been enforced does not mean that it could not be enforced or that it was not intended to be enforce or that it should not be read today as having little significance.

It would be --

Q Are you not suggesting that there isn't at least some ambiguity about this?

A Yes, sir; that with regard to age 21 I am saying that there is no ambiguity that he who runs may read this.

I would not suggest that the Constitution of the

United States is not an instrument that has a capacity for growth. Obviously the power of the central government under the Commerce Clause nad others is much greater now than it was in earlier times, and anyone who bears the scars of Maryland v. Wirtz, can't be unaware of that, but I do submit that it is one thing to allow Congress a very great discretion and considerable free play in deciding what regulatory measures are needed in order to foaster the economy to promote commerce among the several states, but it would be quite another thing to give Congress that same kind of a free hand in regulating the political makeup of the states and partifucularly no relationto the Federal Government.

But this is the one area that up until now has been left to the states. We have still been a body politic, a constituent part of the Federal Union, free to govern ourselves at least in terms of determining how we will govern ourselves, though we must of course yield to Federal legislation in the regulatory sphere.

It is this that in the judgment of Texas is endangered by the statute that is now in front of us. The resort to imaginary harbors is always a risky form of legal reasoning and I prefer not to use it. And yet, as we have suggested in our brief, if this act is constitutional it is hard to visualize any other acts of Congress with regard to voting qualification that cannot be justified as easily and there are a good many

thing that go beyond the area of voting qualifications that Congress might decide were necessary in order to enforce the grants of due process of law and of equal protection.

In Texas's view the reason nobody ever suspected until this past spring that this power is in Congress under the constitution just because the power under the constitution is not in Congress; because the internal controls that the state has with regard to its own government by the constitution is specifically left to the states. With regard to our particular issue here, the choice of the age 21 is one that the Constitution of the United States specifically says Texas may make.

And it is for those reasons that Texas prays for a judgment declaring Title III to be unconstitutional.

MR. CHIEF JUSTICE BURGER: Thank you, Professor Wright.

Mr. Solicitor General.

ORAL ARGUMENT BY HONORABLE ERWIN N. GRISWOLD,
SOLICITOR GENERAL OF THE UNITED STATES, ON
ON BEHALF OF JOHN N. MITCHELL, ATTORNEY GENERAL

MR. GRISWOLD: Mr. Chief Justice, and may it please the Court: the cases now being argued; numbers 43 and 44 original, Oregon and Texas against John N. Mitchell, Attorney General, are being argued first, I suppose, because they have the lower docket numbers.

They involve only the question of age under the

18-year-old vote provision in the Voting Rights Amendment Act of 1970. And I am representing the respondent in those cases.

The two following cases are: The United States against Arizona and the United States against Idaho, numbers 46 and 47 original. They also involve the age provision but in addition to other provisions; one relating to literacy tests and the other relating to residency requirements. In those cases I am representing the Plaintiffs.

Since we were appearing for the plaintiffs today our briefs had to be filed before our brief in this case was due and the consequence is that our principal brief has been filed in the Arizona and Idaho cases, numbers 46 and 47 original.

After the factual statement in that brief there is a general discussion on pages 23 to 39. Then it deals with the literacy and residency matters and finally it deals with voting age at pages 63 to 76. The general portion of that brief, our Arizona brief, and the final portion relating to age, are, in effect, our opening brief in this case.

Then the briefs filed by Oregon and Texas are, in effect, their answering briefs and the brief which we have filed for the defendant in this case is, in effect, our reply brief on the voting age. I have taken this time to explain that situation because I think it is a little confusing if one just picks up the papers.

Now, the chronology and the sides of the parties in

the several cases and the varying issues made this, I think, inevitable.

There is another preliminary matter which I should lay before the Court before I proceed further. I appear in these cases for the defendant, John N. Mitchell, Attorney General of the United States. In the two following cases I appear for the plaintiff, the United States, and the matter about which I speak relates only to the voting age issue which was in all four cases. It does not relate at all to the literacy or residency matters which are involved only in the Arizona and Idaho cases, which will be heard after these cases are concluded.

The Voting Rights Amendment Act of 1970 originated in the House of Representatives simply as a proposal to extend the Voting Rights Act of 1965 which, by its terms, expired in 1970, and to add a provision making it, in effect, no longer as invidious as it had been, by extending the abolition of literacy requirements nationwide.

In the House provisions with respect to residency were added and before it was passed by the House it went to the Senate. In the Senate amendments were proposed to provide for 18 year olds voting; there was extensive consideration and debate in the Senate as to whether this should be done by Act of Congress, or whether it could be done by Act of Congress or whether it should be done by a Constitutional Amendment.

When it was pending before the Senate, officers of the Department of Justice appeared before the Congressional Committees. I may say there are three volumes of hearings with respect to this bill and one, the House hearings, deals only with the literacy and residency and then there are two volumes of Senate hearings before different subcommittees in the summer of 1969 and in February of 1970, where these matters were extensively considered.

Deputy Attorney General Kleindienst appeared before one of the Senate Committees and presented the view of the President that the change should be made but that it should be done by constitutional amendment. And this appears at pages 78 to 80 of the Senate Committee Hearings for February 17, 1970.

And on March 10, 1970 Assistant Attorney General Rehnquist presented to the same committee a substantial statement against the constitutional validity of making the change by statute.

Now, this appears beginning at page 23 of the hearings and the Court will, of course, want to give consideration to these views.

Finally, when the legislation had been passed by Congress as a statutory provision and not a constitutional amendment, and the President signed it on June 22, 1970, the President made a statement, of which I shall read the first two paragraphs. This is the President's statement:

"On Wednesday, Congress completed action on a bill extending and amending the Voting Rights Act of 1965, and sent it to me for signature. As passed the bill contained a rider which I believe to be unconstitutional: a provision lowering the voting age to 18 in Federal, State and local elections. Although I strongly favor the 18-year-old vote I believe, along with most of the nation's leading constitutional scholars, that Congress has no power to enact it by simple statute but rather requires a constitutional amendment.

"Despite my misgivings about the constitutionality of this one provision I have today signed the bill. I directed the Attorney General to cooperate fully in expediting a swift court test of the constitutionality of the 18-year-old provision."

There is more in the statement, but that is the relevant portion. The Attorney General is the party defendant in the two cases now before the court. He signed the complaint for the United States in the two cases which are to follow, the Arizona and the Idaho cases. He has signed the briefs in all four cases. However, because of his relationship to the President, he felt that he should not present the argument in this case. So, I am here and I and my associates have endeavored to support the statute as vigorously as we are able.

As I have indicated, these two cases: Oregon and Texas, involve the validity of the voting age provision only.

It's interesting to note, I think, that Oregon has a literacy provision but it has not chosen to contest this. Similarly Texas has residency provisions but has not chosen to contest them. Thus, we are dealing here only with a voting age provision and this may be the most dififcult of the three provisions to support.

The constitutional validity of this Act of Congress --

Q Before you launch on that, Mr. Solicitor General, is it implicit in what you have said so far that you think the voting age provision may be severable from the rest of the legislation?

A I don't believe I have made any reference to that one way or another. I think that there is a separability provision in the original Voting Rights Act of 1965; the Act of 1970 is in the form of an amendment to that act. Whether that severability provision which, in the amended act, will appear only Title I is applicable to all three titles or not is a nice question. I would suppose that they were severable, simply as a matter of my own personal judgment because they are --

Q Separate --

A They are separate ideas, neither one of which is in any particular way dependent upon the existence or nonexistence of the other. I think if you got, when we come to the residency problems in the cases which follow we will find

that there really are three different ones there and should the Court find that one of those is valid but other aren't, there might be some intricate questions of detail, but I think I would take the position that, although it has not been covered in our brief, that the statutory provisions are severable.

Q The legislative history that you have related -- in United States versus Jackson, as you may remember, the Court relied somewhat on the legislative history of the death penalty provision --

A And, Mr. Justice, as I recall it, there is a general severability provision back in Title I somewhere that could be cited if the Court thought that they ought to be held to be severable.

I don't know that severability is focused on in the legislative history. It is perfectly plain that the several things were discrete, were not interdependent.

Q Was there anything in the legislative history that suggests that any attention was given at the time of this last action of the Congress --

A I do not think so, Mr. Chief Justice. I'll ask my associates to check through and advise me if I am wrong about that. There was just no focus on severability.

The constitutional validity of this Act of Congress, fixing the voting age at 18 years on a nationwide basis, acting under Section 5 of the 14th Amendment, and I find, may it please

the Court, that last week I constantly referred to Section 4 of the 14th Amendment and that was wrong. It's still Section 5.

The constitutionality of this provision is firmly based, I think, on a series of fairly recent decisions of this Court. No one of them deals with this issue by itself, but taken together they seem to me to found a very substantial argument that this statute is a valid exercise of the power expressly given to Congress and by Section 5 of the 14th Amendment.

This can be be shown, I think, by taking up these cases one by one and using them as building blocks to the ultimate conclusion. There are roots in the past, of course, but the first in the cases I wish to mention now is Lassiter against Northampton County Board of Elections in 360 U.S.

That case upheld, inthe absence of any Act of Congress the validity of the Virginia literacy test as a proper exercise of state power under Article I, Section 2 of the constitution. And in reaching that result the Court said at page 51 of 360 U. S.:

"The right of suffrage is subject to the imposition of state standard which are not discriminatory and which do not contravene any restriction that Congress, acting pursuant to its constitutional powers has imposed."

Now, I suppose that analytically that sentence is a truism, but it does indicate that the Court considered that

Congress had constitutional powers under which it could impose restrictions.

It states the proposition for which I stand here and it is, I believe, completely established by this Court's subsequent decision.

The next case to which I will call your attention is Carrington against Rash in 380 U. S., decided in 1965. There the Court had before it a Texas statute which provided that a serviceman could vote only in the county where he resided at the time he entered into service. If he entered into service from another state he could never vote in Texas as long as he was in service, not matter how firmly he had established a residence in Texas. And the Court held that statute invalid under the Equal Protection Clause of the 14th Amendment.

Now, that is simply Section 1, the basic Equal Protection Clause. There wasno Act of Congress involved, and the important thing to note is that the result was reached under the Equal Protection Clause alone. There was not a trace of racial discrimination in the Currington case; there was none of what was referred to in one of the opening arguments as "classic 14th Amendment objectives." There is no suggestion of a foundation of power in the 13th or the 15th Amendments. It is a voting case and it arose under the Equal Protection Clause of the 14th Amendment alone, thus establishing that that clause is, of its own force, applicable to discrimination in voting.

Q Could you say, Mr.Solicitor General, that this in the Carrington case, did indeed create two classes, otherwise the same in all respects; that one entitled to vote and one not entitled to vote?

A The Texas statute did, Mr. Chief Justice; yes. And the Court held that that classification violated the Equal Protection Clause, although there was nothing racial, religious, ethnic; nothing of the traditional historic bases of the Equal Protection Clause involved in it.

Q Would this apply to him if he were a 22-year-old master sergeant or Brigadier General?

A This would apply to him; yes.

Now, of course the reapportionment cases could also be cited in support of the applicability of the Equal Protection Clause alone to voting. But the next case that I am going to refer to in the series I am putting before you is: South Carolina against Katzenbach.

I am doing this in chronological order because it seems to me that's natural. That case involved the Voting Rights Act of 1965. The statute drew support from the 14th and the 15th Amendments and what was important about the case was the scope it gave to the enforcement clauses of those amendments.

Section 2 of the 13th and Section 2 of the 15th Amendment and these are identical with the power to enforce given to Congress by Section 5 of the 14th Amendment.

And, under those provisions the Court held that what Congress had provided in the Voting Rights Act of 1965 the abolition of literacy test was a constitutional provision and I point out that this is almost immediately following this court's decision inthe Lassiter case where the Court had held that the mere existence of literacy provisions did not violate the Equal Protection Clause provision of Section 1.

The significant difference between the situation here and in the Lassiter case is simply that Congress has undertaken to exercise its power under the reinforcement clauses. It's quite clear as I have indicated that it it not merely the enforcement clause of the 14th Amendment but also of the 15th and residually, I think, of the 13th. But here is a situation where Congress, acting under its power to enforce provisions of the constitution made invalid state statutory provisions which had only recently been held to be constitutional under the provisions of the 14th and 15th Amendments themselves.

Now, a few days later, in Harper against the Virginia Board of Elections in 383 U.S. That case proceeded solely under the Equal Protection Clause of the 14th Amendment. And the Court held invalid the poll tax provision which had long been enforced in Virginia.

Of course the situation had racial overtones but it was again a case involving voting where the Court proceeded solely on the basis of the Equal Protection Clause. Perhaps the

Court could have proceeded under the 15th Amendment but it did not do so. Of course, the statute and decision were broader than any matter of merely racial discrimination; they barred white voters who had not paid the poll tax and proceeding simply on a racial basis would not have achieved the result which was achieved in that case.

Now the next in the line of cases is, I suppose, the one of greatest importance here but I do want to suggest that Katzenbach against Morgan does not stand out all alone; it is part of a stream, a part of a development which has been occurring. Katzenbach and Morgan is in 384 U.S., decided four year ago. It upheld the constitutional validity of Section 4e of the Voting Rights Act of 1965.

That was another instance of action by Congress to enforce the 14th Amendment, taken pursuant to the power granted to Congress by Section 5 of the 14th Amendment. As the Court will recall, it provided that persons who had received an education in American Flag schools where the language was otehr than English, through the sixth grade could not be barred from voting on the grounds that they were not literate in the English language.

There was nothing to indicate and never had been anything to indicate that the New York statutory provision requiring literacy in the English language was invalid under the 14th Amendment by itself. But Congress made it invalid by

Section 4e, exercising its enforcing power and this Court upheld the power of Congress to do so. And the Court proceeded solely under Section 5 of the 14th Amendment. Other bases for the exercise of power by Congress were advanced but this Court didnot rely on them. The case did have ethnic overtones but the Carrington decision had already shown that this was not a necessary element to establish the power of Congress.

Q What bearing, if any, do you think the 15th Amendment has on this case?

A I think it may have some bearing except that it is not in any way relied upon by the Court in this decision.

Q I know that. I know that.

A Moreover, I do not suppose there is any evidence in the record that all of the persons affected by any means, were persons who would come within the provisions of the 15th amendment preventing interference with the right to vote because of race; at least as that word race was used in the 15th Amendment.

So, I think I would conclude that the 15th Amendment, though a part of the background, really has nothing to do with it and was not so regarded by the Court.

A I notice in your review of the Court decisions you said nothing about the legislative history of the 14th Amendment in this respect.

Mr. Justice, we have said that because we can't find anything very conclusive. You can pick out passages as you sooften can in the legislative history which support one side rather strongly and you can pick out other passages which seem to be almost equally strong the other way. And the legislative history is reviewed in the concurring opinion of Judge MacKinnon in the Court of Appeals which we have printed in full in the Appendix to our brief in this case and Judge MacKinnon comes to the same conclusion, pointing out, among other things that after the 14th Amendment was adopted Congress went ahead adn proposed the 15th Amendment, indicating that it did not have the view that the 14th Amendment alone solved the problems in that area.

It has sometimes been said that Katzenbach against Morgan provides a startling accession to the power of Congress. It's clearly true that the full potentiality of Section 5 of the 14th Amendment was long unappreciated; indeed, Congress did undertake to exercise the powers under Section 5 shortly after the amendmentwas adopted but the immediately ensuing decisions of this Court were not such as to encourage further experimentation.

Perhaps it was a sleeping giant, but there it is and it has been there for more than a century. As a matter of fact, it was not such an innovation; that is the bringing of it to life. The 18th Amendment had a similar enforcement clause.

In Katzenbach against Morgan the Court cited James Evarard's(?) Breweries against Dade. Now, you will recall that the 18th Amendment forbade the use of alcoholic liquor for beverage purposes. That is language quoted from the 18th Amendment, "for beverage purposes." Inthe statute involved in the James Evarard Breweries, Congress enacted a statute under its power to enforce the 18th Amendmentin which they barred the use of malt liquors for medicinal purposes.

Now, the amendment gave Congress no power over the use of liquor for medicinal purposes except insofar as the power to enforce the 18th Amendment was involved. And in the James Evard Breweries case the Court upheld the constitutional validity and discussed the scope of the enforcing clause saying that it was comparable to the powers given the Congress by the necessary and proper clause, which too, I think are in a sense, a sleeping giant. Not until they were utilized by Congress and shall I say, encouraged by the famous language of Chief Justice Marshall with respect to the scope of the necessary and proper clause, was it fully realized how far Congress could go under that.

Similarly, Congress has no explicit power under the constitution to regulate due process, but the Shreveport case found that power in the necessary and proper clause when it was necessary to make Congress's power over interstate commerce effective and more recently the instance of the same exercise of

power is found in United States against Darby and in many decisions under the Fair Labor Standards Act and the National Labor Relations Act and then more recently in association with South Carolina against Katzenbach there is the case of Katzenbach against McClung decided five years ago, likewise arising under the commerce clause and upholding the exercise of the power of Congress to provide equal accommodations in local restaurants or as an exercise of necessary and proper cause to regulate interstate commerce.

One other case here to which I would like to make reference: Williams against Rhodes decided just two years ago, is an election case wehre the Court proceeded solely under the Equal Protection Clause to strike down provisions of state voting laws which it found discriminatory. This decision, along with Carrington and Rash are enough, it seems to me, to answer the suggestion that Article I, Section 2 of the constitution provides the states with exclusive power in this area.

Q Am I wrong in thinking that Katzenbach against South Carolina was decided under the 15th Amendment?

A Yes, Mr. Justice. It was decided, I think it can be said under the 13th, 14th and 15th amendments, but certainly under the 15th Amendment.

Now there are two more recent cases: Kramer against the Union Free School District, decided last year in 395 U.S. It involved a New York statutory provision under which a

childless person who did not either own real property or rent real property was not allowed to vote in local school elections.

Q Then there was the Phoenix case. I see you don't even cite that.

A Which one?

Q The Phoenix case decided last June.

A City of Phoenix.

Q City of Phoenix.

A Well, yes, those were bond election cases as I recall it and there are -- I don't think I have undertaken tocite every case that has some bearing on it. I think that that I would regard as cumulative and would take whatever support I can get from it. It is cited on page 33 of our brief in the Arizona-Idaho case.

Q Would your argument be the same if you did not have the Section 5 of the 14th Amendment?

A Oh, no, Mr. Justice. I don't think we would have any ground to stand on at all if we didn't have Section 5.

Q That's what I understand.

A Just as in Katzenbach against Morgan the English language literacy requirement was, by common consent, not a violation of the 14th Amendment standing alone, but when Congress, acting under Section 5, decided that it must be be made invalid in order adequatly to enforce the 14th Amendment, this Court upheld it.

Now, I just referred to the Kramer case. I don't really suppose that for our purposes that adds anything to Carrington and Rash; it is simply another case holding that the 14th Amendment is applicable to the Equal Protection Clause of the 14th Amendment is plicable to what might be called "detailed discrimination in the -- in voting rights. I say "detailed discrimination" to distinguish it from ethnic, religious, no Negroes can vote, provisions of that kind.

And the most recently and in some ways it seems to me of the greatest importance, I'm sure that when we were working on the case last spring in my office we did not realize its significance with respect to this problem, but it is the decision last June in Evans against Cornman, 398 U.S.

That case involved a statute of the State of Maryland under which residents of Federal enclaves in Maryland -- in this particular instance, the National Institute of Health -- were not allowed to vote. There was a good deal of uncertainty in the history and not merely the history of this particular area, but also the whole history of the treatment by this Court and of the government of Federally-owned property within

It was found, for example, that residents of this enclave got certain benefits and were subject to certain burdens. On the other hand they did not pay taxes to the State of -- did not pay real estate taxes to the State of Maryland and insofar

as they were renters they did not pay indirectly to the State of Maryland.

On the other hand they sent their children to Maryland schools. If they wanted to adopt a child they did it in Maryland courts. If they wanted a divorce they did it in Maryland courts and questions about that have not in recent years been raised.

Now, Evans and Cornman, like Kramer and like Carrington and Rash, were solely and simply equal protection cases. They are cases saying that specialized discriminations with respect to voting are barred by the Equal Protection Clause alone.

In Evans and Cornman I note was as it appears in the books, a unanimous decision; at least no dissenting votes were stated.

And so we have two lines of cases: one, a series of cases holding that state control of voting rights is subject to the Equal Protection Clause even though there is no racial or ethnic or religious basis for discrimination; even though it doesn't come within the classic, historial foundation of the 14th Amendment.

The leading cases on this are Carrington against Rash, Kramer against the Union Free School District and Evans and Cornman.

And then we have a second line of cases that the

enforcement clauses of the 14th and the 15th Amendments give Congress powers analogous to the necessary and proper clauses and on that I would cite three cases: Katzenbach against McClung, which involved the necessary and proper clause itself with respect to the commerce power; and South Carolina against Katzenbach which involved the enforcing clauses of the 13th, 14th and 15th Amendments; and Katzenbach against Morgan, on which the Court relied and I think could only have relied to achieve the results on the 14th Amendment alone and not on the 15th Amendment's enforcing clause.

Q May I ask you, Mr. Solicitor General, if you have given any consideration to Section 2 of the 14th Amendment?

A Yes, Mr. Justice --

Q Regarding 21 years of age -- in your brief. I haven't looked at it yet.

A Yes, we have in our brief at two places, but particularly I would call your attention to pages 74 to 75 at the very close of our brief. There is also some reference to it in the introductory portion on page 35, I believe and there is further reference to it in our brief in this case which as I have indicated, is in our reply brief.

Q Would you disagree that apart from the 14th Amendment the constitution places voter qualification wholly in the hands of the states?

A Would I say that it does?

Q Would you disagree with that statement?

A I think not, Mr. Justice, though I think maybe I would have almost to read it line-by-line. There is that rather puzzling provision in the very same clause of Article 1, Section 2 which says that the states shall establish voting qualifications but that Congress can make or change provisions with respect to the time, manner and place of holding elections. What "manner" means, I don't know. Manner I should think at least would mean that it must be a secret ballot and should a state make a provision that Negroes will vote in the morning and white people in the afternoon which I don't suppose would violate the 15th Amendment, I can conceive that Congress would have power under that provision to make that invalid.

Q I haven't seen that argued, though, as an independent argument in any of the briefs. "The manner clause."

A There is some suggestion in the casee and in the briefs that Presidential electio are peculiarly Federal; that the right to vote in them is an inherent right of Federal citizenship and tthat Congress would have power, perhaps under the necessary and proper clause to make provisions with respect to voting in Federal elections and that does become somewhat relevant in the cases which we will argue, except for what I would call "fringe" situations. I think I would agree with you that but for the 14th Amendment in the cases I have

already cited and specifically Section 5 of the 14th Amendment, the qualifications to vote would be explicitly a state matter.

Q How about the 14th, 15th and 17th Amendments also?

A Yes; of course the 15th and 17th or 17th and 19th Amendments have limited the power of the states. But the original constitution wasthe constitution through the Civil War, I would agree.

Q With hindsight all of those amendments are surpluses, really.

A With hindsight on the basis of my argument the 15th Amendment could have been done by statute except that Congress could have repealed the statute. Similarly the 19th Amendment could have been done by statute except that Congress could have repealed the statute. Both of those are now, and I think, fortunately, firmly fixed in the constitution and are not merely a matter of statutory provisions; whereas [illegible] visions with respect to literacy it may be much wiser to have them so that they can be modified at some later time by statutory enactment and it may well be true with respect to the voting age. We may find for some reason or other that 18 doesn't work out and that Congress may find it appropriate to repeal that statute and the states will then have that much greater leeway.

Q I thought that it is the contention of at

least somebody, Friends of the Court in this case that, having enacted the statute, it cannot be repealed, relying on Section -- or footnote 10 in the Morgan opinion and relying on cases like Wrightman against Mulke(?) and so on.

A There is the footnote 10 in the Katzenbach against Morgan opinion and I fully agree that Congress could not, by statute, repeal or make ineffective, restrictions which are found in the Equal Protection Clause itself. But I would have no doubt that Congress, having undertaken to enforce the Equal Protection Clause by a statute passed under Section 5, achieving a result which is greater than that which is caused by the Equal Protection Clause itself as in Morgan, as here, would have the power to repeal that statute by which it had undertaken to enforce the --

Q Well, if this isn't within the Equal Protection Clause itself, where did it come from?

A It comes from Section 5 and the necessary and proper concept which is included in Section 5 which, as United States against Darby, as Katzenbach against McClung, as Everard Breweries shows and may urge Congress to go beyond that which is formally prohibited by the constitution itself.

Q Well --

A It seems to me that's the consequence of this Court -- not merely -- it's rightly suggested that Katzenbach against Morgan is some sport that suddenly rose out and

nobody expected it. Actually it has a very sound foundation in our constitutional history in various areas and goesbback, I suppose, shall I say to the discovery of the necessary and proper clause by Chief Justice Marshall. Or at least the adumbration of the necessary and proper clause by Chief Justice Marshall.

Now, where is the discrimination here? Doesn't a line have to be drawn someplace? Of course a line has to be drawn and the question is whether Congress can draw one.

Persons who are 18 to 20 years old are a class or group, which obvious enough that they have interests which are not always represented by older citizens. You can't brush this off simply by saying that our 18 to 20-year olds are just typical of everybody else in the community. On that basis you could have a statute passed by a state which could say that "only citizens whose names begin with G will be entitled to vote. They are a fair sample and it would be a lot cheaper to conduct elections on that basis, so we'll proceed that way." And that obviously would be invalid but, why 18?

Well, I was troubled by this for quite a while. but I finally resolved it in my own mind and in a way that at least seemed to me to be fairly clear. Suppose a state said that no one under 40 could vote, or that no one over 65 could vote. If one looks only at Article I, Section 2, a state could do that. Perhaps this Court could strike it down under the Equal

Protection Clause, but on that basis the Court would have, eventually, to draw the line and the state next year would come up and pass: nobody under 39 and nobody under 38.

But, can there be any doubt that Congress could pass this action under Section 5 of the 14th Amendment to enforce the Equal Protection Clause which would invalidate statutes such as I have suggested?

Q What do you have to say about Professor Wright's response to that? Do you recall his response to that point? I think someone suggested 45 as the limit and he said that didn't matter --

A Well, what I am suggesting, Mr. Justice, is that Congress could, under Section 5, undoubtedly invalidate such a provision but once you accept that is it not clear that Congress has power to fix the line, as an escapable element of its power to enforce the 14th Amendment; otherwise the court would have to be passing on a succession of statutes and finally fixing the line itself and this is peculiarly the kind of line which, it seems to me that Congress is better qualified to fix than this Court is.

Q Mr. Solicitor General --

Q What would you say about a statute passed by Congress that made the voting age 10, age 10? And if you say that they could draw the line for the state.

A On that, Mr. Chief Justice, I am tempted

fall back on Justice Holmes' dictum with respect to the power to tax: "The power to tax is the power to destroy," and that the power to tax is not the power to destroy while this court sits. If you had made it five I would act with considerable confidence on that; ten probably so; 12, 13, 14, if Congress -- actually that is its judgment that that is what it should do, which I find it hard to contemplate doing, undoubtedly there is a point beyond which Congress could not go because it would not be a bona fide, legitimate exercise of the power to enforce the anti-discrimination provisions of the --

Q You link arms with Professor Wright in your response there.

A Except that I think that Congress has authority to do it, at least down to the age of 18 and I don't run into the problem which you raise, which is a problem, until Congress has gone a good deal further than it has now.

Q Mr. Solicitor General, suppose that last term some 18-year-olds had challenged the 21-year-old requirements of the states and we had decided that the 21-year-old voting requirement, age requirement did not violate the Equal Protection Clause; that a state may limit the vote to those who were 21. Then Congress passes this law and the law is challenged and we -- may we or must we, under Katzenbach, say that -- could we say, "Although we adhere to our view of last term, that the 21-year-old age requirement does not violate the Equal Protection

Clause, we nevertheless sustain this Act of Congress?

A Yes, Mr. Justice, I think that you would be required to do that and under your decisions that's exactly what happened with respect to literacy.

Q What would be appropriate then in the Congressional legislation in that respect? Is this just an assertion by Congress that the Court was --

A No, Mr. Justice; the language that the Court has used is "perceive a basis" and I don't think this is a matter of building a record like in a court case where you have to have evidence to support the findings of the court, but there would have to be either findings by Congress or legislative history which would provide material from which this Court could perceive a basis for what Congress has done.

Q Well, would we then be changing our minds from last term?

A No, Mr. Justice. You would be saying that though this is not a violation of Equal Protection as prescribed by Section 1 of the Constitution it is the kind of thing that Congress can do if, in its judgment it thinks it is necessary in order to enforce the Equal Protection Clause, just as the power to regulate intrastate commerce, never given by the constitution to Congress, is frequently upheld by this Court as an inherent -- as a proper exercise of power under the necessary and proper clause to enforce the power of Congress to regulate interstate

commerce.

Q Because of its impact on interstate commerce, but here if the Equal Protection Clause doesn't require 18-year-olds to be given the vote what -- how could you perceive a basis for Congressional enforcement of something that the Equal Protection Clause doesn't require at all?

A Mr. Justice, I don't want to overstate it. I think it is a very close question. I think it is much more delicate, shall I say, here than in the commerce situation because there you can -- at least we have a long tradition that the intrastate commerce has an effect on interstate commerce, but I think that that bridge was really passed in Katzenbach against Morgan, where there was no suggestion that the discrimination against foreign language schools was invalid under the Equal Protection Clause -- no one had ever held that it was invalid. Indeed, in the case immediately following, although it's complicated by the fact that the statute was passed by Congress, the question arose simply as an attack on the New York courts under the New York statute and this Court found it invalid, not under the Equal Protection Clause, but under Section 5 of the Equal Protection Clause, pursuant to the power of Congress to enforce.

Q That was a sort of double-barrel decision; wasn't it? In the sense that --

A No, Mr. Justice I don't --

Q In the sense that these two bases were --

A I don't think, for example, that the decision by itself, without any Act of Congress, would be applicable to children who, let us say, in Hawaii, had studied only in the Hawaiian language schools or to children who, in this country, for one reason or another, had studied only in German language or some other language schools. It does apply to Spanish language schools and thus might be applicable, perhaps in part of Texas if there were such schools. There are not state schools in Texas which are not in English, but there might be private schools.

Q Mr. Solicitor General, you haven't commented yet, I think, and I don't recall what you said in your brief about the essence of the second sentence of Section 2 of the 14th Amendment, relating to the penalty in effect, the sanction on the states for denying the vote to a citizen under 21.

A Well, Mr. Chief Justice, I suppose that Section 2 of the 14th Amendment is the most abortive provision which still remains in the amendment. Itwould seem a little odd to me that the only effect it has ever had in American history would be to qualify or negative the power expressly given to Congress by Section 5 of the 14th Amendment, but I don't think that there is anything in Section 2 which in any way qualifies the power given to Congress by Section 5.

Q Do you think it would have a tendency to

deter the states from having this abnormal voting age we discussed earlier, 40 or 45? Would it have a deterrent effect?

A Yes; I suppose that it might, as a practical matter, have had a deterrent effect from having an age above 21, although it hasn't been enforced as to its other aspects and, whether, as a practical matter, it could be enforced in that sense by reducing representation in Congress if states went above 21 I don't know, but I don't think that there is anything in Section 2 which has any bearing on ages less than 21.

That's too strong. It obviously has some bearing. It stated age 21. It certainly reflected the understanding of the time that that was the current voting age. I do not think it can be said that Article I, Section 2 prescribes 21 as the voting age for any purpose. For example: suppose a state did pass a statute such as I have said and nobody under 40 can vote; under Article II they might lose their representation, but there is nothing in Article II which would say that persons between 21 and 30 can vote because of Article II. Nothing whatever, because Article II says 21 that wouldn't prevent states from saying you can't vote unless you are 40.

The only thing that could prevent astate from doing that would be the Equal Protection Clause itself, Section 1.

Q Well, doesn't this afford some kind of

a backstop to it, though, as an alternative measure?

A I would say "background," but I don't know about "backstop."

Q Well, what about a situation where a state so acted and it was demonstrated by the evidence that 55 -- let's say one-half for convenience -- one half of all the voters otherwise and previously eligible to vote, and Congress took no action, would an individual in suits like the reapportionment cases, be able to get the courts to do something about that?

A To issue a writ of mandamus to compel Congress to reduce the representation in the House of Representatives? It takes me aback a little. Obviously it has never been done. I suppose that's one of the reasons why --

Q I suppose it's partly because no states have ever undertaken to fix age 40 --

A Oh, but states did on a wholesale basis keep people from voting, contrary to the provisions of Section 2 of Article XIV, for 50 or 75 years in this country and nothing was done about it.

Q Not on the age basis that we're --

A Not on an age basis, but on, as far as Section 2 is concerned it was equally applicable to that elimination.

Q Do you think might offer -- the fact that

the current 21 years of age you referred to as current, the voting age, was exercised properly by the states, since it did not affect race?

A 21 years --

Q That's what I say: 21 years of age.

A Well, I think that the provisions of Section 2 of the 14th Amendment provides an entrance upon which there is some tendency to conclude that 21 was contemplated as the voting age. I only suggest --

Q Twenty-one as fixed by the states, was within their power?

A That it was within their power; yes. I have no doubt -- I don't suppose anybody has ever questioned the --

Q As long as it doesn't affect -- well, I suppose these cases question question it, that it's within the power of the states --

A Twenty-one --

Q -- to decide what the age qualifications will be.

A No one has ever questioned that 21 as fixed by the states is a perfectly valid provision under the Equal Protection Clause unless and until Congress undertakes to exercise the power expressly given to Congress by Section 5 of the 14th Amendment to enforce the Equal Protection Clause.

Q Well, I suppose you would agree -- I'm not arguing now with you at all -- but I suppose you would agree that there are some powers to fix qualifications that the states have that that 5th provision of the amendment wouldn't justify taking away from it?

A Yes, Mr. Justice, I think that's true and I'm sure that was contemplated when it was written, but I find it very hard to find very clear and convincing instances of things which the state can do which Congress cannot change with respect to voting, by action under Section 5 of the 14th Amendment.

Q That's a pretty drastic --

A I think it must be recognized that the power of Congress under Section 5 of the 14th Amendment as recognized bythis Court in Katzenback against Morgan, is a very broad power.

Q Which would give the right to fix the ages of the voters who must vote for constable, and inferior officers like that?

A Yes, Mr. Justice, if Congress chooses to exercise the power to that extent, and I can imagine situations where that would be very important.

Q Would your response to that, Mr. Solicitor General, be the same if Congress had fixed 20 years and three months?

A Yes, Mr. Justice, I can imagine a bill being passed by the House and being passed by the Senate and going to conference and in conference it's like 27 and a half percent depletion. We got that because that was a compromise in conference and this bill might well have turned out 19-and-a-half instead of 18. Actually, both Houses of Congress did adopt the bill of age 18 and I think it's not irrelevant that the key vote in the Senate, really on the issue of whether it should be done by statute or by constitutional amendment, was 64 to 17. There was a very strong sentiment in the Senate that it could be done by statute. When it went back to the House the House accepted the Senate Amendment and there was no division there.

Q I suppose, Mr. Solicitor General, your view as to Katzenbach against Morgan would apply not only to the Equal Protection Clause, but also to the Due Process Clause, would it, of the 14th Amendment?

A Of the 14th Amendment, yes; I have no doubt, Mr. Justice, that if Congress finds that some action of a state could be a denial of due process that it could pass a statute within considerable limits. The Chief Justice,has forced me back to ten years and I preferred to stand on five. I think there are places beyond which the power under Section 5 would not extend the voting and I suppose at some point this Court would have to decide whether the statute undertaking to enforce the Due Process Clause was so unrelated to that

objective that it was not within the famous language of Chief Justice Marshall as an appropriate exercise of a necessary and proper power.

Q In the testimony of Dr. Margaret Meade, which I scanned -- not real close, but, was there any cross-examination of her or other witnesses suggesting the difference in the age of maturity and the different latitudes as a rational factor for people to take into account, if you recall that?

A No; I do not recall, Mr. Justice.

Q Would that conceivably be a rational basis where we could proceed -- with the language of Morgan and --

A It's conceivably rational, but I should think,highly undesirable and it seems to me that if we are going to have a Federal law with respect to this that it ought to be nationwide and that would apply to the southern tip of Florida and to Point Barrow, Alaska, as far as I am concerned, as a legislator and I acan find no difference in the constitutional position.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Solicitor General.

I think, Professor Wright, we will not ask you to split your rebuttal in two parts unless you prefer to do it.

MR. WRIGHT: Mr. Chief Justice, it's been agreed that I would make the rebuttal for both arguments and I believe I can do it before the lunch recess if that would suit the Court.

MR. CHIEF JUSTICE BURGER: Very well.

REBUTTAL ARGUMENT BY CHARLES ALAN WRIGHT,

ON BEHALF OF THE PLAINTIFFS

MR. WRIGHT: I will endeavor, seeing the clock, to make my points rapidly.

First, with regard to the question that Justice Harlan and Justice Stewart asked about separability, I believe that Section 205 of the statute provides a sufficient answer. It is a separability clause, part of the 1970 legislation itself; it appears in a sort of funny place. You generally expect to find severability clauses at the end of a statute, but this particular Title III was added as a rider in the Senate. It was the final section as it passed the House; it does speak generally to the Act.

So, the age provisions of Title III can be separated from the literacy and durational residency provisions of the other portions of the act.

I would not wish my argument to have been understood at all as suggesting that the 14th Amendment, and specifically the Equal Protection Clause of the 14th Amendment do not reach the question of voter qualifications. I recognize the force of the historical arguments that Justice Harlan has mustered on several occasions, but my own conclusion has been that the whole history of the 39th Congress and the various legislation and the constitutional amendments it produced is

sufficiently inconclusive about interpreting those provisions of the constitution. It is better simply to look at the constitutional language that to try to discern the intend of the framers.

My recollection is that in Harper v. Board of Elections it was argued here that one of the members of the Court inquired if Virginia could deny the franchise to persons who had red hair and the answer, since the position they argued was that the Equal Protection Clause was totally inadequate for, the answer was, "Yes."

Now, I do not envy counsel who was in a position where he had to give that answer. Plainly a discrimination that invidious is one that would be very odd if the Equal Protection Clause didn't reach.

And so cases such as Evans v. Cornman in which my friend the Solicitor General finds great comfort, do not trouble me at all. They seem -- the are wholly consistent with the position we take here that voter qualifications may be a matter within the account of the Equal Protection Clause, but that this particular qualification that we are defending in this case is not one that either this Court or the Congress can rationally say falls afoul of the Equal Protection Clause of the 14th Amendment.

The principal burden of my argument in chief was that to sustain this statute would be to replace a system of

constitutional Federalism with a system of Congressional Federalism. And I undertook to suggest to you that this seems peculiarly inappropriate with regard to the political arrangements of the states that Congress should be allowed to decide for itself the extent of its power to order the political arrangements in Texas and other states.

Twenty-eight years ago George Braden wrote an article in the Chicago Law Review called "Umpire to the Federal System," and it seems to me that that is one of the highest functions of this Court, that when disputes arise between Congress and the states as to their respective powers we can't ask Congress to decide whether it is safe throughout; we come here because this Court in the tradition of Marlborough v. Madison, it must make that decision.

I think that it would not be only constitutional Federalism that would be jeopardized by the decision against us here, but we would also run a great risk of replacing constitutional liberty, the Congressional liberty, because I have the diffulty that Justice Harlan indicated from the bench with regard to footnote 10 in the Morgan opinion, and it is hard to see what Congress might not do if Congress were to be given as broad a scope as argued under Section 5 of the 14th Amendment.

It is true, as the Solicitor General says, that Section 2 of the 14th Amendment is old; it is one that is probably little-used as ineffective a provision as appears in the

constitution but it is there and I do not think the constitutional provisions wither away by -- or the words that were adopted bythe country in Section 2 of the 14th Amendment are any less potent today simply because they have not been invoked and on occasions in which they might have been appropriate.

Thank you very much, Mr.Chief Justice.

MR. CHIEF JUSTICE BURGER: Thank you, Professor Wright.

I think we'll recess.

(Whereupon, at 12:00 o'clock p.m. the argument in the above-entitled matter was concluded)